(6)

No. 96-203

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JOYCE B. JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The National Association of Criminal Defense Lawyers (NACDL) submits this brief as *amicus curiae* in support of the petitioner. Letters from the parties to this case expressing their consent to the filing of this brief are on file with the Clerk.

INTEREST OF *AMICUS*

NACDL is a nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. It has a membership of more than 9,000 attorneys and 28,000 affiliate members in 50 states. NACDL is recognized by the American Bar Association as an affiliate organization, and has full representation in the ABA's House of Delegates. As part of

its mission, NACDL strives to the defend individual liberties guaranteed by the Bill of Rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents two important and recurring questions regarding direct appeals of criminal convictions. First, what is the appropriate standard of review of an action by the district court to which the defendant did not object at trial, where an objection would have been futile under then-existing circuit precedent, but a later decision makes it clear that the district court erred? Second, under what circumstances should a criminal conviction be reversed where the jury was prevented from considering an essential element of the charge?

1. The first issue requires the Court to decide whether to apply Fed. R. Crim. P. 52(a) (the ordinary harmless-error standard) or Rule 52(b) (the plain-error standard). The plain-error standard differs in three respects: First, under Rule 52(b) only clear and obvious errors may be corrected; there is no similar restriction under 52(a). Second, under Rule 52(a) the burden is on the government to prove that the error was harmless, while under Rule 52(b) the defendant must prove that it was harmful. Third, reversal is mandatory under Rule 52(a) but discretionary under Rule 52(b).[1] Ordinarily, the plain-error standard applies when the defendant seeks to raise an issue for the first time on appeal.

But when an objection at trial would obviously have been futile because it was foreclosed by well settled circuit precedent, the policies underlying the plain-error rule (and the closely related contemporaneous-objection rule) are not implicated. In such a case the defendant's failure to object is excused, and review should proceed under Rule 52(a) as if the objection had been made and overruled. Alternatively, if the plain-error standard applies, the Court should hold that the obviousness of the error must be assessed in light

[1]*United States v. Olano*, 113 S. Ct. 1770, 1776-79 (1993).

of the law at the time of the appeal. In addition, the plain-error rule's strictures should be loosened in cases like this one, because the defendant's failure to object was justified in light of the law at the time of trial.

2. The second question is how to determine whether an error that prevents the jury from considering an essential element of the crime affects the defendant's substantial rights. The Eleventh Circuit held the error to be harmless because it found the government's evidence to be overwhelming. But that kind of appellate fact-finding violates the Sixth Amendment. Unless a defendant consents to a bench trial, a conviction must be based on a finding of guilt by the jury, not by the trial judge or by the court of appeals. If the jury is prevented from making a finding on an essential element of the charge, the error is harmful —and the conviction must ordinarily be reversed—even though the court of appeals may believe that the defendant is obviously guilty and that he would have been convicted even under the proper instructions. And that conclusion holds true under both the plain-error standard and the harmless-error standard.

ARGUMENT

I.

Where the district court's action was correct under then-prevailing law, but erroneous under current law, the defendant's failure to have made a futile objection should not affect the standard of review.

1. The district court in this case decided the issue of materiality as a matter of law rather than letting the jury decide it. Because that was proper under the then-prevailing rule in the Eleventh Circuit (and in most of the other circuits as well),[2] any objection to the district court's

[2]*E.g., United States v. Molinares*, 700 F.2d 647, 653 (11th Cir. 1983); *United States v. Gaudin*, 28 F.3d 943, 955 (9th Cir. 1994) (Kozinski, J., dissenting)(collecting cases), *aff'd*, 115 S. Ct. 2310

action would have been futile. Consequently, Johnson did not object. But this Court's subsequent decision in *United States v. Gaudin* makes it clear that the district court's action was wrong.[3] Under *Griffith v. Kentucky*, Gaudin applies here retroactively, because this case was pending on direct appeal when *Gaudin* was decided.[4] This case therefore raises the question of how the *Griffith* principle should be applied where the defendant did not object at trial because an objection would have been futile. Specifically, should the error in such cases be reviewed differently than in a case where the defendant did object at trial?

Consideration of the purposes underlying the contemporaneous-objection rule suggests that the two kinds of cases should be treated the same. Ordinarily a defendant must object at trial in order to preserve an error for appeal because the objection gives the trial court a chance to correct the error, thereby obviating the need for an appeal.[5] But that policy does not apply where the objection would be futile under prevailing caselaw.[6] In that event, an objection would not prevent the trial court from committing the error. Moreover, there is little risk of "sandbagging" in such a case. The defendant is unlikely to deliberately withhold an objection in order to manufacture an appealable error, since he will have no reason to think that the objection would ultimately succeed on appeal.

If in these circumstances the error is reviewable only under a stricter-than-usual standard (or *a fortiori* if it is not reviewable at all), the defendant will be penalized for having failed to predict the future. That is not only unfair, but it makes for a bad rule of judicial administration.

(1995).

[3]*United States v. Gaudin*, 115 S. Ct. 2310 (1995).

[4]*See Griffith v. Kentucky*, 479 U.S. 314 (1987).

[5]*See, e.g., Estelle v. Williams*, 425 U.S. 501, 508 n.3 (1976).

[6]*See, e.g., Reed v. Ross*, 468 U.S. 1, 15 (1984).

Consider the consequences of a rule that requires defendants to pay a cost for failing to raise a futile objection: Defense counsel will have an incentive to raise objections that are frivolous under then-existing law, but that might conceivably be recognized at some point in the future.[7] That would waste time and disrupt the flow of the proceedings.

It would also present defense counsel with a Hobson's choice: The only way to fully protect the record for appeal would be to raise objections that will undoubtedly be denied. But a lawyer who continually makes frivolous objections runs the risk of losing credibility in the trial court, like the boy who cried "Wolf." When counsel finally raises a meritorious objection, he may be ignored. Therefore it is usually best to object only if the objection has a reasonable chance of succeeding.[8] Counsel should be able to follow that course without fear that they are inadequately protecting their clients' appeal rights.

This commonsense conclusion is supported by two alternative lines of doctrinal analysis. The first draws on the general proposition that "[t]he law does not require the doing of a futile act."[9] For example, where a right to seek judicial relief is conditioned on first exhausting an administrative, contractual, or other remedy (a requirement having obvious parallels to the contemporaneous-objection rule), a failure to exhaust is excused if any attempt to pursue the remedy would have been futile.[10] More

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[7]*Id.* at 15-16.

[8]*See, e.g.*, 1 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 52 at 209-10 (4th ed. 1992)(Practitioner's ed.).

[9]*Ohio v. Roberts*, 448 U.S. 56, 74 (1980).

[10]*See, e.g., McCarthy v. Madigan*, 503 U.S. 140, 148 (1992); *Honig v. Doe*, 484 U.S. 305, 326-27 (1988); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *Glover v. St. Louis-San Francisco R. Co.*, 393 U.S. 324, 330-31 (1969); *Schultz v. Owens-Illinois Inc.*, 696 F.2d 505, 511-12 (7th Cir. 1982).

broadly, the performance of a condition precedent to the creation or the exercise of a legal right can be excused if it would require a futile act.[11] Under this principle, this case should not be treated as one where the defendant has forfeited a right by having failed to raise it, but rather as one where the failure to object is excused. Thus, the case should be decided as if an objection had been made and overruled (*i.e.*, under Fed. R. Crim. P. 52(a)) rather than under the plain-error rule.[12]

Alternatively, much the same result can be reached within the confines of the plain-error rule. In cases such as this one, where there has been a posttrial change in the controlling law, the trial court's action should be regarded as a "plain" error if it is obviously wrong in view of the law at the time of the appeal. (This is the rule followed in one form or another by at least eight of the circuits.[13])

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[11]*See, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-67 (1977)(employment discrimination); *Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1275 (7th Cir. 1996)(contracts); *Wolff & Munier, Inc. v. Whiting-Turner Contracting Co.*, 946 F.2d 1003, 1009 (2d Cir. 1991) (contracts); *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1450-52 (4th Cir. 1990)(housing discrimination).

[12]This is the approach followed by the *en banc* Ninth Circuit in *United States v. Keys*, 95 F.3d 874, 877-80 (9th Cir. 1996)(*en banc*). *Accord United States v. McGuire*, 79 F.3d 1396, 1406-13 (5th Cir.)(Weiner, J., concurring), *on reh'g en banc*, 99 F.3d 671 (5th Cir. 1996). The Tenth Circuit has also held that the plain-error rule does not apply to the kind of error at issue here, although it reached that conclusion by a different analytical route. *United States v. Wiles*, No. 94-1592, U.S. App. LEXIS 31853 at *25-49 (10th Cir. Dec. 10, 1996)(*en banc*).

[13]*See, e.g., United States v. Randazzo*, 80 F.3d 623, 630-32 (1st Cir. 1996); *United States v. Viola*, 35 F.3d 37, 41-42 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1270 (1995); *United States v. Retos*, 25 F.3d 1220, 1230 (3d Cir. 1994); *United States v. David*, 83 F.3d 638, 644-46 (4th Cir. 1996); *United States v. Bencs*, 28 F.3d 555, 564 (6th Cir. 1994),

Moreover, the language of Rule 52(b) is sufficiently open-ended to permit the Court to hold as a matter of supervisory authority[14] that in such cases the rigors of the plain-error rule should be relaxed. The Second Circuit has in effect adopted this approach by holding that in cases involving posttrial changes in the law, the burden of persuasion on the issue of prejudice under Rule 52(b) shifts to the government.[15] That conclusion is eminently sensible. In addition, it would be appropriate for the Court to hold that although reversal under Rule 52(b) is discretionary,[16] in supervening-decision cases such as this one there should be a presumption (if not a flat rule) in favor of reversal.[17]

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cert. denied, 115 S. Ct. 915 (1995); *United States v. Holmes*, 93 F.3d 289, 292-93 (7th Cir. 1996); *United States v. Baumgardner*, 85 F.3d 1305, 1308-09 (8th Cir. 1996); *United States v. Kramer*, 73 F.3d 1067, 1074 n.16 (11th Cir.), *cert. denied*, 136 L. Ed. 2d 405 (1996).

Although the D.C. Circuit has held that under Rule 52(b) the error must have been obvious at the time of the trial, it follows a "supervening-decision doctrine" under which the defendant's failure to object at trial is excused if an objection would have seemed futile under then-existing law but the law has subsequently changed in the defendant's favor. *E.g., United States v. Smart*, 98 F.3d 1379, 1393 (D.C. Cir. 1996); *United States v. Washington*, 12 F.3d 1128, 1138 (D.C. Cir.), *cert. denied*, 115 S. Ct. 98 (1994). It is unclear whether the D.C. Circuit's analysis operates within Rule 52(b) or independently of Rule 52(b). *See McGuire*, 79 F.3d at 1410 (Wiener, J., concurring).

[14]*See, e.g., Thomas v. Arn*, 474 U.S. 140, 146-48 (1985).

[15]*United States v. Ballistrea*, No. 95-1578, 1996 U.S. App. LEXIS 30967 at *19-20 (2d Cir. Nov. 25, 1996); *Viola*, 35 F.3d at 41-42.

[16]*Olano*, 113 S. Ct. at 1778-79; *see also* pp. 23-25, *infra*.

[17]*Cf. Ortega-Rodriguez v. United States*, 113 S. Ct. 1199, 1209 n.23 (1993)(discretion may be limited by the adoption of "generally applicable rules to cover recurring situations"). *See also* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 771-73 (1982).

2. It follows from what we have said that in cases such as this, the doctrine of "invited error" is inapposite. Under the invited-error rule, a defendant may not challenge an action that the district court took at the defendant's request.[18] The rule is ordinarily a reasonable safeguard against a defendant's attempt to engage in tactical gamesmanship. But that rationale does not apply when there has been a posttrial change in the controlling law. Defense counsel cannot be faulted for making tactical decisions in reliance on the state of the law at the time of trial. That is what lawyers are supposed to do. If counsel relies in good faith on what reasonably appears to be the controlling law, the defendant should not lose the ability to rely on subsequent legal changes.

II.

A jury-instruction error affects the defendant's substantial rights if it prevents the jury from making a finding on an essential element of the charge.

We come now to the issue on which the Eleventh Circuit's decision turned: whether the district court's error affected Johnson's substantial rights. The court held that her substantial rights were not affected because it found "overwhelming evidence" that her statements to the grand jury were material. The court therefore thought that she would still have been convicted even under the proper instructions.[19]

This ruling was wrong because in a case such as this, where the jury is prevented from considering every element of the charge, a court of appeals may not weigh the evidence to decide for itself whether the defendant is guilty.

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[18]*See, e.g., United States v. Johnson*, 26 F.3d 669, 677 (7th Cir.), *cert. denied*, 115 S. Ct. 344 (1994); *United States v. Sharpe*, 996 F.2d 125, 129 (6th Cir.), *cert. denied*, 510 U.S. 951 (1993); *United States v. Ahmad*, 974 F.2d 1163, 1165 (9th Cir. 1992).

[19]Pet. App. 9a.

Nor may the court speculate as to what the jury would have done had it been properly instructed. Both of those inquiries invade the decision-making function that the Sixth Amendment assigns exclusively to the jury. As we will show, a defendant's substantial rights are infringed any time the jury is permitted to convict without finding that the government has proved every element of the crime beyond a reasonable doubt.[20]

A. The Court's decision here will apply to both the harmless-error and plain-error standards, and to a variety of jury-instruction errors.

Even if the Court holds that this case is governed by the plain-error standard, the impact of its decision here will not be limited to cases decided under that standard. Nor will it be limited to those where the trial court expressly decides an essential element of the charge as a matter of law. Rather, the decision will apply equally to cases where the defendant did object to the trial court's action and to cases involving a variety of jury-instruction errors.

1. The "substantial rights" analysis under Rule 52(b) is (with one exception) identical to ordinary harmless-error analysis under Rule 52(a).[21] The relevant language of the two provisions is identical: Rule 52(a) defines a harmless error as one that does not "affect substantial rights," while Rule 52(b) refers to plain errors "affecting substantial rights." A term that appears in different parts of the same rule or statute is presumed to mean the same thing each

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[20]Notably, the Eleventh Circuit seems to have recognized that the approach it followed below is improper: After the petition for *certiorari* was filed in this case, the court decided *United States v. Rogers*, 94 F.3d 1519, 1524-26 (11th Cir. 1996), which follows an analysis similar to what we advocate here.

[21]*Olano*, 113 S. Ct. at 1777-78.

time it appears.[22] Thus, the method for determining whether a defendant's substantial rights have been violated is the same whether or not the defendant objected at trial. The only difference between Rule 52(a) and Rule 52(b) is that under Rule 52(a) the government has the burden of proving that the error was harmless, while under Rule 52(b) the defendant must prove that the error was harm*ful*.[23]

This means that the Court's ruling about substantial-rights analysis cannot be restricted to the plain-error standard, but will necessarily extend to ordinary harmless-error cases. If the plain-error standard permits courts of appeals weigh the evidence in cases where the jury was prevented from considering element of the charge, then such appellate fact-finding will be permissible in harmless-error cases as well. Conversely, if appellate fact-finding in such cases is improper under Rule 52(a), it is equally improper under Rule 52(b). Therefore, references in this brief to harmless error or harmful error encompass both halves of Rule 52.

2. Nor are issues raised here unique to cases where the trial judge finds as a matter of law that the government has proven an element of the charge. Rather, they arise in any case where the jury is permitted to convict the defendant without finding every element of the charge to have been proved beyond a reasonable doubt.

A criminal defendant is entitled under the Sixth Amendment to have findings on all elements of the charge made by the jury.[24] That right is of course violated if the trial judge expressly takes an issue away from the jury and decides it as a matter of law—what has come to be known as "*Gaudin* error." But that is merely the most blatant way in which the defendant's Sixth-Amendment rights can be

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[22]*E.g.*, *Commissioner v. Lundy*, 116 S. Ct. 647, 655 (1996); *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1067 (1995).

[23]*See Olano*, 113 S. Ct. at 1777-78.

[24]*Gaudin*, 115 S. Ct. at 2313-16.

violated, not the only way. The defendant's rights can be violated just as effectively by various other kinds of errors: an instruction that the government is not required to prove an essential element of the charge;[25] an instruction that omits an essential element;[26] an instruction that seriously misdescribes an element;[27] or (in some cases) an instruction that directs the jury to apply an unconstitutional presumption.[28] These errors all permit the jury to convict without finding that every element of the charge has been proved. And if the instructions do not require the jury to find every element, a reviewing court must assume that the jury did not find every element.

Where a jury returns a general verdict, the jurors' deliberations may not be probed in order to examine the findings on which the verdict is based. The only way to determine what facts the jury found is by looking at the instructions, to see what the jury was told to decide.[29] Since juries are presumed to follow their instructions, a verdict of guilty represents a finding of whatever facts the jury was told were necessary to support a conviction. But it represents a finding of those facts only. If the jury was not told to decide a particular issue, an appellate court may not conclude that it undertook to decide the issue *sua sponte*.

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[25]*E.g.*, *United States v. Aramony*, 88 F.3d 1369, 1385-87 (4th Cir. 1996).

[26]*E.g.*, *Wiles*, 1996 U.S. App. LEXIS 31853 at *25-49; *United States v. Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996); *United States v. Gallerani*, 68 F.3d 611, 617-19 (2d Cir. 1995).

[27]*E.g.*, *United States v. Aguilar*, 80 F.3d 329, 330-34 (9th Cir. 1996)(*en banc*); *Peck v. United States*, 73 F.3d 1220, 1223-24, 1227-28 (2d Cir. 1995).

[28]*See, e.g.*, *Yates v. Evatt*, 500 U.S. 391 (1991); *Carella v. California*, 491 U.S. 263 (1991); *id.* at 267-73 (Scalia, J., concurring in the judgment).

[29]*See generally Yates*, 500 U.S. at 404.

Jurors presumably do not make unnecessary work for themselves by deciding issues not identified by the instructions.[30] Moreover, jurors "are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law[.]"[31] Indeed, they are typically told that they are duty-bound to follow the judge's instructions on the law.[32] Therefore, "[w]hen . . . jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error."[33]

So if the jury is not told about element *X* (or if it is told that the government need not prove *X* or that the government may prove *Y* instead), the case may differ in form from one involving pure *Gaudin* error, but in substance it is identical. In both kinds of cases, the defendant is convicted without a proper determination of guilt by the jury. Our discussion in this brief therefore refers both to *Gaudin* error and to the other kinds of instructional error that we have mentioned. For want of a better term, we refer to all of these as "elemental" errors, since they all relate to the elements of the crime.

B. The appellate court may not weigh the evidence to decide whether the defendant is guilty or whether he would have been convicted even under the proper instructions.

1. Johnson's conviction was affirmed because the Eleventh Circuit found "overwhelming evidence" that

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[30]*See, e.g., Yates v. Evatt*, 500 U.S. at 406 n.10; *Sandstrom v. Montana*, 442 U.S. 510, 526 n.13 (1979).

[31]*Griffin v. United States*, 502 U.S. 46, 59 (1991).

[32]*See, e.g.*, 1 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE & INSTRUCTIONS § 12.01 (4th ed. 1992).

[33]*Griffin*, 502 U.S. at 59. *Cf. Yates*, 500 U.S. at 406 n.10; *Sandstrom v. Montana*, 442 U.S. 510, 526 n.13 (1979).

Johnson's statements were material and concluded that no reasonable juror could have found otherwise. Whether it is appropriate for a court of appeals to weigh the evidence in this manner in the guise of harmless-error analysis has been much debated over the years.[34] We assume for the sake of discussion that this kind of appellate fact-finding is appropriate for many kinds of errors.[35] But that does not dispose of this case. Elemental errors are different in kind from most other errors, and they demand a different approach to the question of harmless error.[36]

The notion that an appellate court may consider the weight of the evidence in conducting its harmless-error analysis is based on the assumption that the jury has actually found every fact necessary to support the conviction.[37] Where that assumption holds true, the question is whether the facially sufficient jury verdict was tainted by error. But the assumption does not hold true in

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[34]*See, e.g.*, 2 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 32.4d (2d ed. 1994); ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 17-25 (1970); Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1185-99 (1995)[cited hereafter as Edwards, *To Err is Human*]; Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335 (1994).

[35]*See, e.g., Milton v. Wainwright*, 407 U.S. 371, 372-73 (1972); *Schneble v. Florida*, 405 U.S. 427, 430-32 (1972); *Harrington v. California*, 395 U.S. 250, 254 (1969). *But see, e.g.*, THE RIDDLE OF HARMLESS ERROR 17-22 (criticizing this approach); Edwards, *To Err Is Human*, 70 N.Y.U. L. REV. at 1192-99 (same).

[36]*See, e.g., Carella*, 491 U.S. at 267 (Scalia, J. concurring in the judgment)(harmless-error analysis applicable to mandatory conclusive presumptions "is wholly unlike the typical form of such analysis").

[37]*Cf. Sullivan v. Louisiana*, 113 S. Ct. 2078, 2081-82 (1993); *Yates*, 500 U.S. at 405-06 & n.10.

cases involving elemental error. In such cases, the jury has not found the defendant guilty of every element of the crime beyond a reasonable doubt, and therefore has not rendered a "verdict within the meaning of the Sixth Amendment" at all.[38] Consequently, the premise of ordinary harmless-error analysis is absent. If there has been no verdict that the defendant is guilty of every element beyond a reasonable doubt, "the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent a constitutional violation is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate."[39]

Thus, this Court has held for at least fifty years that an erroneous instruction about the elements of the crime cannot be held harmless merely because the reviewing court believes that the defendant was guilty and would have been convicted even under the proper instructions.[40] For example, in *Kotteakos v. United States*, the seminal decision on harmless error, the Court explained that an appellate court should not "speculate upon probable reconviction" and that the question of harmfulness does not turn on whether "conviction would, or might probably have resulted in a properly conducted trial[.]"[41] Similarly, in *Bollenbach v. United States* the Court said that the question is not "whether guilt may be spelt out of a record," but whether guilt was properly found by the jury.[42] More recently, the Court said in *Cabana v. Bullock* that "[f]indings

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[38]*Sullivan*, 113 S. Ct. at 2082.

[39]*Id.* at 2082 (emphasis in the original).

[40]*Yates*, 500 U.S. at 402-03 n.8.

[41]*Kotteakos v. United States*, 328 U.S. 750, 763, 776 (1946).

[42]*Bollenbach v. United States*, 326 U.S. 607, 614 (1946); *see also id.* at 615; *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408-09, 410 (1947); *Weiler v. United States*, 323 U.S. 606, 611 (1945).

made by a judge cannot cure deficiencies in the jury's finding . . . resulting from the court's failure to instruct it to find an element of the crime."[43]

The basis for this rule is simple. A judge may never direct a verdict of conviction, even if the government's case is overwhelming.[44] Such an error can never be harmless because "the wrong entity judged the defendant guilty."[45] An instruction that prevents the jury from considering every element of the crime is in effect a partial directed verdict, because—like a directed verdict—it prevents the jury from performing its constitutionally mandated function.[46] Appellate speculation about what the jury might have done under the proper instructions doesn't remedy the trial court's error, it compounds it. Indeed, due process prohibits a court of appeals from affirming a conviction based on a legal theory that was not submitted to the jury.[47]

The Court's most recent discussion of the harmful-error analysis applicable to jury instructions is *Sullivan v. Louisiana*. The Court explained there that the Sixth Amendment "requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts

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[43]*Cabana v. Bullock*, 474 U.S. 376, 384 (1986). *Cf. SEC v. Chenery*, 318 U.S. 80, 88 (1943).

[44]*E.g., Sullivan*, 113 S. Ct. at 2080; *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *United Brotherhood of Carpenters*, 330 U.S. at 408, 410.

[45]*Rose v. Clark*, 478 U.S. 570, 578 (1986). *See also Henderson v. Morgan*, 426 U.S. 637, 650 (1976)(White, J., concurring)(denial of jury trial on "one or all" elements of the crime cannot be harmless error).

[46]*See, e.g., United Brotherhood of Carpenters*, 330 U.S. at 408-09, 410; *Carella*, 491 U.S. at 268-69 (Scalia, J., concurring in the judgment).

[47]*Presnell v. Georgia*, 439 U.S. 14 (1978)

for the State would be sustainable on appeal[.]"[48] Because "[h]armless-error review looks . . . to the basis on which the jury actually rested its verdict[,]" an appellate court may not "hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be[.]"[49]

Although *Sullivan* dealt with an unconstitutional reasonable-doubt instruction, its condemnation of "appellate speculation" applies equally to elemental errors.[50] The Court relied heavily on cases regarding erroneous instructions about elements of the crime,[51] and it has subsequently described *Sullivan* as holding that convictions must "rest upon a jury determination that the defendant is guilty *of every element* of the crime . . . beyond a reasonable doubt."[52] Moreover, as the Court has noted, a verdict based on the wrong rule of substantive law "is not

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[48]113 S. Ct. at 2082.

[49]113 S. Ct. at 2081 (emphasis in the original; internal quotes and citation omitted).

[50]For court-of-appeals decisions reaching this conclusion, see, *e.g.*, *Wiles*, 1996 U.S. App. LEXIS 31853 at *42-43; *Waldemer v. United States*, 98 F.3d 306, 308-09 (7th Cir. 1996); *United States v. Aguilar*, 80 F.3d 329, 333 (9th Cir. 1996)(en banc); *United States v. DiRico*, 78 F.3d 732, 736-37 (1st Cir. 1996); *Pettigrew*, 77 F.3d at 1511; *Peck v. United States*, 73 F.3d 1220, 1227-28 (2d Cir. 1995); *United States v. Forbes*, 64 F.3d 928, 934-35 (4th Cir. 1995). *Cf.* Edwards, *To Err is Human*, 70 N.Y.U. L. REV. at 1200-01 (reading *Sullivan* as being broadly applicable to harmless-error analysis in general). *But see United States v. Kleinbart*, 27 F.3d 586, 590 (D.C. Cir.) (dictum), *cert. denied*, 115 S. Ct. 456 (1994).

[51]113 S. Ct. at 2081-82 (citing *Yates*, 111 S. Ct. at 1893; *Carella*, 491 U.S. at 271 (Scalia, J., concurring in the judgment); *Rose*, 478 U.S. at 578; *id.* at 593 (Blackmun, J., dissenting); *Pope v. Illinois*, 481 U.S. 497, 509-10 (1987)(Stevens, J., dissenting); and *Bollenbach*, 326 U.S. at 614).

[52]*Gaudin*, 115 S. Ct. at 2313 (emphasis added).

materially different" from one based on an improper standard of proof.[53] If a conviction must be reversed when the jury finds all the elements of the crime but applies the wrong standard of proof, then it must also be reversed when the jury does not find whether an essential element was proved at all, by any standard of proof.

Thus, in his concurring opinion in *California v. Roy*, Justice Scalia (joined by Justice Ginsburg) applied the *Sullivan* analysis to an instruction that incorrectly described the *mens rea* necessary to support a conviction—an elemental error.[54] Justice Scalia noted that because of the error, the jury had not found the defendant guilty of every element of the crime. He went on to explain that the error was not harmless even though the defendant would undoubtedly have been convicted even under the proper instructions: "To allow the error to be cured in that fashion would be to dispense with trial by jury."[55]

The operation of the proper approach to harmless error is illustrated by *McNally v. United States* and *Chiarella v. United States*.[56] In each of these cases, the Court held that the defendant had been convicted on an improper legal theory. And in each case the government argued as a fallback position that the evidence supported conviction even under the correct legal standard—*i.e.*, that the error was harmless. But the Court refused to weigh the evidence or speculate about what might have happened had the jury been properly instructed. In *McNally* the Court noted simply that "there was nothing in the jury charge that

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[53]*United Brotherhood of Carpenters*, 330 U.S. at 410.

[54]*California v. Roy*, 117 S. Ct. 337, 339-40 (1996)(Scalia, J., concurring).

[55]*Id.* at 339.

[56]*McNally v. United States*, 483 U.S. 350 (1987); *Chiarella v. United States*, 445 U.S. 222 (1980).

required [the necessary] finding."[57] And in *Chiarella* the Court explained that "we cannot affirm a criminal conviction on the basis of a theory not presented to the jury[.]"[58]

2. Although three of this Court's decisions concerning elemental error contain language consistent with the Eleventh Circuit's holding in this case, that language does not affect our analysis. The language in two of the cases does not accurately reflect the current state of the law, and the language in the third is inapplicable to cases on direct appeal as opposed to collateral review.

(a) In *Rose v. Clark*, the Court stated that if the jury is instructed to apply an unconstitutional conclusive presumption, the error is harmless "[w]here a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt[.]"[59] But in *Yates v. Evatt* the Court expressly disapproved that language.[60] As *Yates* explains, it is inappropriate for an appellate court to consider the weight of the evidence where the instructions prevent the jury from considering all the evidence.[61] Moreover, the holding in *Rose* was premised on the fact that presumptions generally leave the jury free to decide whether every required element has been proved. A presumption is triggered by predicate facts that must themselves be proved beyond a reasonable doubt; frequently the predicate facts are so closely related to the ultimate fact to be presumed that a finding of the predicate

[57] *McNally*, 483 U.S. at 361.

[58] *Chiarella*, 445 U.S. at 236.

[59] *Rose*, 478 U.S. at 579.

[60] *Yates*, 500 U.S. at 402-03 n.8.

[61] *Id.* at 405-06 & n. 10.

facts is equivalent to a finding of the ultimate fact.[62] In that event, the presumption does not prevent the jury from making the required findings.

(b) The Court also seemed to endorse speculation about what a properly instructed jury would have done in *Pope v. Illinois*. *Pope* was an obscenity case where the jury had been incorrectly instructed on how to decide the question of redeeming social value.[63] The majority opinion said that the error was harmless if a rational juror could not find such value even under the correct legal standard, and that a conviction may be affirmed even if the jury was not required to find every element of the crime under the proper standard of proof.[64] But those statements have no precedential weight, for two reasons.

First, it is apparent in hindsight that a majority of the Court disagreed with them. The four dissenting Justices argued that an instruction misstating an element of the crime can never be harmless, and that an appellate court "is not free to decide in a criminal case that, if asked, a jury *would* have found something that it did not find."[65] Although Justice Scalia joined the majority opinion, he filed a separate opinion explaining that he concurred only because he thought that the finding required by the erroneous instructions was no different in substance than what the correct instructions would have required.[66] Subsequent opinions have made it clear that he agreed with

[62] *Rose*, 478 U.S. at 580 n.8, 580-81; *see also Sullivan*, 113 S. Ct. at 2084 (Rehnquist, C.J., concurring)(error in *Rose* did not "remove[] an element of the offense from the jury's consideration"); *Carella*, 491 U.S. at 271 (Scalia, J., concurring in the judgment).

[63] *Pope v. Illinois*, 481 U.S. 497 (1987).

[64] *Id.* at 504 & n.7.

[65] *Id.* at 508, 509-10 (Stevens, J., joined by Brennan, Marshall & Blackmun, JJ., dissenting)(emphasis in the original).

[66] *Id.* at 504 (Scalia, J., concurring).

the dissenters' approach to harmless error.[67] Thus, what seems to be a majority opinion on this point really isn't.

Second, *Pope*'s harmless-error analysis has in any event been abandoned by the Court's subsequent decisions. It has been cited only once in an opinion of the Court: in *Arizona v. Fulminante*, where it was one of 17 cases included in a string-cite supporting a statement that most constitutional errors are subject to harmless-error analysis.[68] But none of the Court's post-*Pope* decisions dealing with erroneous jury instructions (most notably, *Carella*, *Yates*, and *Sullivan*) has cited the *Pope* "majority" opinion. Rather, the Court has relied on the harmless-error analysis advanced by the *dissenters* in *Pope*.[69]

(c) Finally, in *United States v. Frady* the Court held that an elemental error was not prejudicial, in part because the evidence of the defendant's guilt was overwhelming.[70] But *Frady* reached the Court as a proceeding under 28 U.S.C. § 2555 seeking collateral review of a conviction that had become final 17 years earlier. It was decided under the cause-and-prejudice standard, which is substantially harder for a defendant to satisfy than the plain-error standard.[71] Thus, the Court's seeming approval of the "overwhelming

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[67] *Roy*, 117 S. Ct. at 339-40 (Scalia, J., concurring); *Sullivan*, 113 S. Ct. at 2080-82; *Yates*, 500 U.S. at 413-14 (Scalia, J., concurring in part and concurring in the judgment); *Carella*, 491 U.S. at 267-73 (Scalia, J., concurring in the judgment).

[68] *Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991).

[69] *Sullivan*, 113 S. Ct. at 2082 (citing *Pope*, 481 U.S. at 509-10 (Stevens, J., dissenting)).

[70] *United States v. Frady*, 456 U.S. 152, 171-72 (1982).

[71] *Id.* at 165, 166. *See also Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).

evidence" approach in the context of collateral review is not controlling in cases arising on direct appeal.[72]

3. We do not contend that elemental errors can never be harmless. To be sure, elemental errors usually affect the verdict, and are ordinarily grounds for reversal.[73] But there are a few narrow circumstances under which an appellate court can conclude that the error had no effect on the verdict and therefore was harmless.

First, the record may demonstrate that despite the erroneous instruction the jury in fact made all the necessary findings. For example, if the jury returned a special verdict or a general verdict accompanied by answers to special interrogatories, the jury's answers will indicate what specific facts it found.[74] Such cases will be rare, though, because general verdicts are preferred in criminal cases.[75] More common are cases where the instructions dealing with a different count require the jury to make the finding at issue.[76] Second, an instruction to apply an unconstitutional mandatory presumption can be harmless if the predicate facts that trigger the presumption are so closely related to

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[72] Moreover, the result in *Frady* would have been the same under any standard of review, because the erroneous instruction did not prevent the jury from making all the findings necessary to support the conviction. *See Frady*, 456 U.S. at 172-74; *see also* n. 77, *infra* & accompanying text.

[73] *See* TRAYNOR, THE RIDDLE OF HARMLESS ERROR 73-74.

[74] *See, e.g., United States v. Edmond*, 52 F.3d 1080, 1107 (D.C. Cir.), *cert. denied*, 116 S. Ct. 539 (1995); *United States v. Mitchell*, 49 F.3d 769, 781 (D.C. Cir.), *cert. denied*, 116 S. Ct. 327 (1995).

[75] *See, e.g., United States v. Spock*, 416 F.2d 165, 180-83 (1st Cir. 1969).

[76] *See, e.g., Roy*, 117 S. Ct. at 339-40, (Scalia, J., concurring); *Forbes*, 64 F.3d at 934-35; *United States v. Whitmore*, 24 F.3d 32, 35 (9th Cir. 1994). *Cf. Frady*, 456 U.S. at 172-74 (erroneous instruction on malice as element of murder was not prejudicial where jury's finding of premeditation necessarily entailed a finding of malice).

the presumed fact that they are functionally equivalent to it.[77] In that event, the jury's finding that the predicate facts were proved necessarily amounts to a finding that the ultimate fact was proved as well. Third, the error may be harmless if the erroneous instruction related solely to a count on which the defendant was acquitted.[78] Finally, the error may be harmless if the defendant expressly conceded the element in question, thereby waiving the right to have the jury decide that issue.[79] But the concession must be clear and explicit, and not simply a tactical decision not to dispute the government's evidence on a particular point.[80]

Because an elemental error can be harmless in one of these special circumstances, it would not be appropriate to classify the broad category of elemental errors as "structural" errors.[81] But that label is appropriate if one focuses on the subclass of elemental errors that are harmful (*i.e.*, to cases involving none of the circumstances discussed in the previous paragraph). The Court held in *Sullivan* that "[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt . . . unquestionably qualifies as structural error."[82] As we have explained, a conviction without a jury determination on every element of the crime is no different than the conviction in *Sullivan*: In both cases the defendant

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[77]*See, e.g., Roy*, 117 S. Ct. at 339-40 (Scalia, J., concurring); *Sullivan*, 113 S. Ct. at 2082; *Carella*, 491 U.S at 267; *id.* at 271 (Scalia, J., concurring in the judgment); *Rose*, 478 U.S. at 580-81.

[78]*See Carella*, 491 U.S. at 270 (Scalia, J., concurring in the judgment); *United States v. McGuire*, 99 F.3d 671 (5th Cir. 1996)(en banc).

[79]*See Carella*, 491 U.S. at 270 (Scalia, J, concurring in the judgment); *United States v. Melina*, No. 95-1802, 1996 U.S. App. LEXIS 30900 at *10-13 (8th Cir. Nov. 29, 1996).

[80]*See Estelle v. McGuire*, 502 U.S. 62, 69 (1991).

[81]*See Roy*, 117 S. Ct. at 339; *Fulminante*, 499 U.S. at 306-07.

[82]113 S. Ct. at 2083 (internal quotation marks omitted).

was denied the kind of jury verdict that the Sixth Amendment requires.[83] Consequently, *Sullivan*'s holding on the structural-error question applies to harmful elemental errors as well.[84]

III.

If the jury did not find the defendant guilty of every element of the crime beyond a reasonable doubt, the error seriously affected the fairness and integrity of the trial.

If the Court holds that this case is governed by the plain-error standard, one issue remains. Under *Olano*, the court of appeals is authorized to reverse a plain error that affected the defendant's substantial rights, but the decision whether or not to reverse is discretionary.[85] Reversal is appropriate if the defendant is actually innocent or if the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings."[86] The Court need not concern itself here with cases falling within the "innocence" category, which are for obvious reasons intensely fact-bound. But this case presents the Court with an opportunity to provide the courts of appeals with some much-needed guidance regarding the circumstances in which an error seriously affects the fairness, integrity, or reputation of judicial proceedings.

Some of the courts of appeals have held that convictions should be affirmed under this prong of the *Olano* standard if the defendant would still have been convicted under the

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[83]*See* pages 16-17, *supra*.

[84]*See Wiles*, 1996 U.S. App. LEXIS 31853 at *25-49.

[85]*Olano*, 113 S. Ct. at 1778.

[86]*Id.* at 1779 (internal quotation marks and citation omitted).

proper instructions.[87] In doing so, those courts ignore *Olano*'s statement that "[a]n error may 'seriously affect the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."[88] More seriously, they engage in precisely the kind of appellate fact-finding and speculation that the Sixth Amendment forbids, only they do it under the rubric of "discretion" rather than as an aspect of harmful-error analysis. But the demands of the Sixth Amendment do not vary depending on the label that a court uses to describe what it is doing. If the jury has not made all the findings necessary to support a conviction, the appellate court may not fill in the gap, period.

A harmful elemental error satisfies the *Olano* standard because it necessarily has a serious effect on the trial's fairness and integrity. The right to a jury trial in a criminal case "reflects a profound judgment about the way in which law should be enforced and justice administered."[89] And as the Court said in *Sullivan*, the requirement that a finding of guilt be made *by the jury* is "the most important element" of the jury-trial guarantee.[90] Thus, a proper jury verdict is an indispensable condition precedent to the entry of a judgment of conviction; as we have shown, its absence is a structural defect in the trial process. Without a proper jury verdict, the trial judge has no more authority to enter a judgment of conviction than would the court reporter.[91]

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[87]*E.g.*, *United States v. Ross*, 77 F.3d 1525, 1540-41 (7th Cir. 1996); *United States v. Allen*, 76 F.3d 1348, 1368 (5th Cir.), *cert. denied*, 117 S. Ct. 121 (1996).

[88]*Olano*, 113 S. Ct. at 1779.

[89]*Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

[90]113 S. Ct. at 2080.

[91]For circuit-court decisions holding that harmful elemental errors by definition satisfy the *Olano* serious-effect standard, see *United States v. Baumgardner*, 85 F.3d 1305, 1310 (8th Cir. 1996);

Our analysis here is consistent with the fact that reversal under Rule 52(b) is discretionary. Discretionary decisions do not invariably call for a case-by-case, fact-specific analysis: As we have noted, discretion may be channelled and limited through the adoption of "generally applicable rules to cover recurring situations."[92] To the extent that the text of Rule 52(b) does not require one result or another, this Court may announce such general rules as a matter of its supervisory authority over the courts of appeals.[93] Indeed, the *Olano* standard is itself such a rule. Of course, some kinds of errors can only be evaluated case by case—for example, rulings on evidence or jury instructions about witness credibility. But other kinds (such as harmful elemental errors) can be dealt with categorically.

Therefore, reversal is appropriate under the plain-error standard whenever a defendant shows that he was convicted without a jury finding on every element of the charge. At a minimum, there should be a presumption in favor of reversal. Such a presumption would recognize the inherently serious nature of elemental error, while leaving open the possibility that there might be some circumstances in which the *Olano* standard is not satisfied.

United States v. Perez, 67 F.3d 1371, 1386 (9th Cir. 1995), *reh'g en banc granted*, 77 F.3d 1210 (9th Cir. 1996); *Gaudin*, 28 F.3d at 952. The First and Second Circuits have reached the same conclusion regarding erroneous reasonable-doubt instructions, as has the Fourth Circuit with regard to constructive amendments of the indictment. *United States v. Colon-Pagan*, 1 F.3d 80 (1st Cir. 1993) (Breyer, C.J.); *United States v. Birbal*, 62 F.3d 456, 461 (2d Cir. 1995); *United States v. Floresca*, 38 F.3d 706, 713-14 (4th Cir. 1994).

[92]*Ortega-Rodriguez*, 113 S. Ct. at 1209 n.23. *See also* Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. at 771-73.

[93]*Cf. Thomas*, 474 U.S. at 146-48.

CONCLUSION

The right to trial by jury in criminal cases is not merely a procedural right. Its purpose is to "prevent oppression by the Government" by "interpos[ing] between the accused and his accuser . . . the commonsense judgment of a group of laymen[.]"[94] The allocation of governmental power exclusively to a panel of jurors is therefore just as much an aspect of the separation of powers as is the division of authority among the legislature, the executive, and the judiciary. In this case, the Eleventh Circuit applied the purely procedural doctrines of harmless error and plain error in a way that erodes the profoundly substantive rights guaranteed by the Sixth Amendment.

The judgment below should therefore be reversed.

Respectfully submitted.

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[94] *Williams v. Florida*, 399 U.S. 78, 100 (1970).